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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NELSON MAURICIO LUNATY GARCIA, Defendant and Appellant.	G055497 (Super. Ct. No. 15NF2479) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jonathan S. Fish, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Christine

Levingston Bergman, Kelley Johnson and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

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Nelson Mauricio Lunaty Garcia (Lunaty)[1] appeals from the judgment following his conviction on various charges involving two victims. As to the primary victim, he was convicted of kidnapping with intent to commit a sex offense, several forcible sex crimes, and carrying a loaded firearm in public. As to the second victim, he was convicted of attempted kidnapping with intent to commit a sex offense and four counts of simple assault. Each of the assault convictions was a lesser-included offense of an attempted sex crime.

Lunaty does not challenge the substance of his convictions on counts one through five and eleven—all pertaining to the primary victim. However, he contends the judgment must be reversed because the evidence was insufficient to support either his conviction of attempting to kidnap the second victim for purposes of a sex crime or his four convictions of assault against that second victim.

He also argues that even if the evidence were sufficient to sustain the assault convictions, he is entitled to have three of those convictions reversed because they amount to multiple convictions for a single wrong, and he would be entitled to have the sentences on all four assault convictions stayed pursuant to Penal Code section 654.[2]

Finally, in a supplemental opening brief, Lunaty contends the court erred by failing to consider the fact he may be suffering from post-traumatic stress disorder as a consequence of his military service, as a mitigating factor when it imposed his sentence.

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[1] Appellant was consistently referred to in the trial court as Lunaty. We follow suit.

[2] All further statutory references are to the Penal Code.

The Attorney General responds that the evidence is sufficient to support Lunaty's conviction for attempted kidnapping of the second victim, but concedes his misdemeanor assault convictions must be vacated as there is insufficient evidence that any battery was imminent. We agree on both counts.

We disagree with the Attorney General, however, on the issue raised in Lunaty's supplemental brief. The evidence demonstrates that while the trial court considered Lunaty's military service as a potential mitigating factor, there is no suggestion it gave distinct consideration to the possible impact of Lunaty's service-related post-traumatic stress disorder (PTSD).

FACTS

The crimes Lunaty was charged with all took place on the night of September 2, 2015. He left his work shortly after 9:30 p.m., without clocking out as required, and went to a bar called InCahoots in Fullerton. He waited in the bar's parking lot for women who were leaving the bar alone and going to their cars.

At approximately 11:45 p.m., a female employee of InCahoots—referred to in the information as Jane Doe #2 (JD2)—left work early because she was not feeling well. Lunaty approached JD2's car as she was sitting in the driver's seat, removing her shoes. He knocked on the car door, and because JD2 had not yet started the car—and thus could not open her window—she opened the car door slightly.

JD2 did not know Lunaty, who stood near her car door with his hands on his hips. Although Lunaty never identified himself as a police officer, JD2 had the impression he might be an undercover police officer based on what he was wearing—a polo shirt, slacks with a belt and nice shoes. He asked her, "Have you been drinking tonight?" She told him she had not been drinking, and explained she was "just sick." Lunaty then asked her if she needed water. When she told him no, he said "Okay. Well, do you need anything? Do you need a police escort home?"

By that point, JD2 was "a little scared," thinking the situation had become "weird," so she told Lunaty "no" and closed her car door. Lunaty then walked away from the car and stood in front of the store next door as JD2 finished removing her boots and drove away.

A short while later, the primary victim, identified in the information as Jane Doe #1 ("JD1"), exited InCahoots with a friend; each of them went to her own car. JD1 recalled that she had been sitting in her car for a few minutes, taking off her boots and replacing items in her purse, when Lunaty approached her car and knocked on the window. JD1 rolled down her window and Lunaty asked her whether she had been drinking. When she responded "yes," he asked her how many drinks she had had and also asked her for her driver's license.

After JD1 gave Lunaty her driver's license, he walked to the back of her car with it, and appeared to be talking into a radio device perched on his shoulder. JD1 also noticed Lunaty wore something on his hip that resembled a detective's badge. She thought he was a police officer.

When Lunaty returned to her door, he asked JD1 to step out of her car and she complied. Lunaty asked her a number of questions such as how old she was, whether she worked or was in school, and whether she had a boyfriend. He advised her that she was slurring her words, and told her he was going to conduct some tests.

Lunaty used a tongue depressor and a cotton swab to wipe the inside of JD1's mouth. He then directed her to his car, where he patted her down "mostly around the pockets of [her] shorts" and "under [and] around [her] bra." After Lunaty directed JD1 to put her hands behind her back, she asked him, "Am I getting arrested?" And he replied, "It looks that way, doesn't it." He secured JD1's hands behind her back with zip ties and placed her in the back of his car.

Lunaty then drove away from the bar, and pointed to a nearby building which JD1 recalled him describing as something like "the office or jail I work out of." After he had been driving for a few minutes—claiming he was "making his rounds in the area"—JD1 began to question whether he was really a police officer, and she started to cry and was "freaking out." She asked Lunaty where he was taking her and he responded, "I am going to take you in. This is going to look really bad on your record." Although JD1 asked Lunaty what police department he worked for, he said he could not tell her.

Lunaty told JD1 that after she was arrested, she would not be able to get a job, would have to pay for a lawyer, go to court, and that her car would be towed. He also told her he had "bigger fish he could fry" and did not want to book her. Eventually, he asked her if she could "think of anything that we can do instead so I can go catch somebody else?" When she inquired what he meant, Lunaty suggested she "think outside the box." JD1 asked if she could contact someone to give her a ride home, but Lunaty replied, "It is too late for that. You can't do that now."

When JD1 offered no further suggestions, Lunaty told her he was getting angry and she was "running out of time." Finally, JD1 asked Lunaty if he was implying she should do something sexual, and he replied, "Yeah, that would be nice." When she expressed shock at his suggestion, he told her "that is what it is going to take. That is what it is going to be" if she did not want to be taken in.

Lunaty then parked in an unpaved area that overlooked the city of Fullerton. He removed the zip ties binding JD1's wrists and pulled up JD1's shirt to look at her body. When she tried to pull down her shirt, he began to pull down her shorts. Again, JD1 resisted, but she was unsuccessful.

Ultimately, Lunaty forced JD1 to orally copulate him, digitally penetrated her anus, and sodomized her. Afterward, JD1 asked Lunaty to drive her back to her car, which he did. On the way, he repeatedly asked her whether they could do this again, and she said no.

After they arrived back at the bar's parking lot, JD1 sat in her car for awhile because she was so shaken, and then she drove home. She did not immediately report the incident to police because she wanted to forget it.

Meanwhile, Lunaty returned to his work place around 2:00 a.m. He bragged to a co-worker that he had "picked up a girl in a bar," and offered the co-worker the opportunity to "smell his fingers." He also mused that it would be "cool if he could impersonate a police officer and have [a girl] perform sexual favors on [him] to get her off the hook."

Nearly a week later, after JD1 had time to think about what Lunaty had done to her—and she began worrying it might happen to someone else—she disclosed the details to the friend who had been with her at InCahoots. JD1's friend encouraged JD1 to call the police and also to tell her brother what happened. JD1 told her brother, and he and JD1's friend decided to return to the bar the next night to see if they could spot anyone who matched JD1's description of Lunaty. JD1's brother spotted Lunaty sitting in his car and called the police.

Patrol officers from the Fullerton Police Department responded to the call and initiated contact with Lunaty, who seemed very nervous. When they searched his car, they found a nylon briefcase bag with a loaded gun, a pair of handcuffs, a walkie-talkie with an ear piece and microphone, scissors, and what appeared to be a homemade police identification from the Fullerton Police Department in the name of John McClain. The police also found tongue depressors, Q-tips (both used and new), and zip ties. Later testing of semen found on JD1's shorts matched Lunaty's DNA profile.

Not long after Lunaty's arrest, JD2 saw a Facebook post with his photo, seeking information about an incident at InCahoots. She called the police hotline number from the Facebook post and reported what had happened to her.

In connection with his primary victim, JDI, Lunaty was charged with: kidnapping with intent to commit a sex offense (count one; § 209, subd. (b)(1)); forcible oral copulation (count two; § 288a, subd. (c)(2)(A)); forcible sexual penetration (count three; § 289, subd. (a)(1)(A)); forcible sodomy (count four; § 286, subd. (c)(2)(A)); attempted forcible rape (count five; §§ 664, subd. (a), 261, subd. (a)(2)); and carrying a loaded firearm in public (count eleven; § 25850, subds. (a) & (c)(7)). The jury convicted him on all of those counts.

Additionally, as to the forcible sex offenses alleged in counts two through four, the jury found true the allegations that Lunaty kidnapped JD1 (§ 667.61, subds. (b) & (e)) and the movement substantially increased the risk of harm to her (§ 667.61, subds. (a) & (d)(2)).

In connection with Lunaty's other victim, JD2, he was charged with: attempted kidnapping to commit a sexual offense (count six; §§ 664, subd. (a), 209, subd. (b)(1)); attempted forcible oral copulation (count seven; §§ 664, subd. (a), 288a, subd. (c)(2)(A)); attempted sexual penetration (count eight; §§ 664, subd. (a), 289, subd. (a)(1)(A)); attempted forcible rape (count nine; §§ 664, subd. (a), 261, subd. (a)(2)); and attempted forcible sodomy (count ten; §§ 664, subd. (a), 286, subd. (c)(2) (A)). The jury convicted him of attempted kidnapping, but acquitted him on the four other counts alleging attempted sexual offenses. The jury found him guilty of the lesser included offense of simple assault (§ 240) in connection with each of those four counts.

The court sentenced Lunaty to a term of 32 years to life in prison, comprised of: an indeterminate term of 25 years to life on count two (forcible oral copulation) pursuant to section 667.61, subdivision (a); three stayed indeterminate life terms on counts one (kidnapping with intent to commit a sexual offense), three (forcible sexual penetration), and four (forcible sodomy); a consecutive determinate term of 7 years on count six (attempted kidnapping to commit a sexual offense); a stayed determinate term on count five (attempted forcible rape), and five concurrent terms of six months on counts seven through ten (simple assault) and count eleven (gun possession in public).

DISCUSSION

1. *Sufficiency of the Evidence to Support Attempted Kidnapping (Count Six)*

Lunaty first argues the evidence is insufficient to support his conviction on count six, alleging he attempted to kidnap JD2 with the intent to commit a sexual offense. "Our task in deciding a challenge to the sufficiency of the evidence is a well-established one. '[W]e review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Solomon* (2010) 49 Cal.4th 792, 811.)

In doing so, "'the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] This standard applies whether direct or circumstantial evidence is involved. 'Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] "'If the circumstances reasonably justify the trier of fact's

findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'"""" (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

The crime of kidnapping with intent to commit a sexual offense is defined in section 209, subdivision (b)(1), which punishes "Any person who kidnaps or carries away any individual to commit robbery, rape, spousal rape, oral copulation, sodomy, or any violation of Section 264.1, 288, or 289." To establish an attempted kidnapping for a sex offense, the evidence must show two things: "'[the] intent to commit the crime, and a direct ineffectual act done towards its commission.'" (*People v. Johnson* (2013) 57 Cal.4th 250, 258; People v. Davis (2009) 46 Cal.4th 539, 606 (*Davis*).) And "[f]or purposes of an attempt, '[s]pecific intent may be, and usually must be, inferred from circumstantial evidence.'" (*Davis*, at p. 606.)

Lunaty contends the evidence of an attempted kidnapping is insufficient in this case because it demonstrates "mere preparation," which as explained in *People v. Buffum* (1953) 40 Cal.2d 709, 718, overruled on another ground in *People v. Morante*, (1999) 20 Cal.4th 403, 424, is not sufficient to support an attempt conviction. While there is no uniform standard that can be applied in every case to distinguish mere preparation from an actual attempt, we conclude that Lunaty's actions toward JD2 amounted to an attempt in this case.

In arguing his conduct toward JD2 was merely preparation, Lunaty relies on *People v. Luna* (2009) 170 Cal.App.4th 535 (*Luna*), but the case is distinguishable. In *Luna*, the court concluded that the defendant's purchase of the tools necessary to manufacture hashish, as well as several (but not all) of the ingredients required, was merely preparation for the crime of manufacturing a controlled substance and did not qualify as committing """'some appreciable fragment'"" of the crime itself. (*Id*. at p. 543.) The court noted that at the time of the defendant's arrest, he had not yet purchased the marijuana from which the hashish would be made, and thus it could not be

said that "'a crime [was] about to be consummated absent an intervening force . . . .'" (*Id*. at p. 544.)

In this case, by contrast, Lunaty had gathered all of his tools and completed his preparations. Moreover, he did not merely drive to the InCahoots parking lot contemplating his chances of luring a woman into his car, he got out of his car, approached JD2, and made an effort to get her out of her own car. When she thwarted his initial strategy by denying she'd had anything to drink, he altered his plan by asking if she wanted a "police escort" home. Both inquiries were affirmative efforts to get JD2 to an isolated, vulnerable location under false pretenses. In taking those actions, Lunaty was not just contemplating his intended crime, he was attempting to actually commit it.

Lunaty also relies on *People v. Memro* (1985) 38 Cal.3d 658 (*Memro*), overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2. In *Memro*, the Supreme Court stated, in dicta, that the defendant's act of taking his victim into his apartment "probably fell within the 'zone of preparation,'" and it was not until he "ushered the boy into the bedroom to watch the strobe lights" that he began his attempt to engage in lewd conduct. (*Id.* at p. 699.)

However, the attempted crime at issue in *Memro* was the sex offense itself—which would not be commenced while the victim was still in the defendant's living room—rather than a kidnapping. *Memro* provides an excellent example of why "none of the various 'tests' used by the courts can possibly distinguish all preparations from all attempts." (*Memro, supra,* 38 Cal.3d at p. 699.) In this case, Lunaty's effort to get JD2 to a more isolated location for the purpose of sexually assaulting her was sufficient to demonstrate he engaged in an attempt to kidnap her for that purpose.

2. *Sufficiency of the Evidence to Support Assault (Counts Seven through Ten)*

Lunaty next contends the evidence was insufficient to support his four convictions for the crime of assault. This argument is well taken. As the Attorney General concedes, the crime of assault requires evidence that the defendant had the "present ability, to commit a violent injury" on his victim, (§ 240), and we agree there is no evidence suggesting Lunaty had that present ability with respect to JD2.

"'An assault is an incipient or inchoate battery; a battery is a consummated assault.'" (*People v. Chance* (2008) 44 Cal.4th 1164, 1170.) Thus, an assault occurs whenever """[t]he next movement would, *at least to all appearance*, complete the battery."""" (*Ibid*.) In other words, the "present ability" element is "satisfied when 'a defendant has attained the means and location to strike immediately.'" (*Id.* at p. 1168.)

In this case, there is no evidence suggesting Lunaty's next movement against JD2 would be a battery. Indeed, in the relatively public setting of the bar's parking lot, it appeared his strategy was to coax or intimidate his victims, rather than batter them, into doing what he wanted. Consequently, Lunaty's conviction on the four counts of assault must be reversed based on the insufficiency of the evidence to support them.

In light of our decision on that issue, we need not address Lunaty's alternative claims of error with respect to those counts.

3. *Consideration of PTSD as a Mitigating Factor*

Finally, Lunaty contends the trial court erred by failing to consider that he may be suffering from PTSD as a consequence of his military service as a mitigating factor when imposing his sentence on count five (attempted forcible rape against JD1) and on count six (attempted kidnapping to commit a sexual offense against JD2.)

Penal Code section 1170.91, subdivision (a), requires such consideration, stating that "[i]f the court concludes that a defendant convicted of a felony offense is, or

was, a member of the United States military who may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service, the court shall consider the circumstance as a factor in mitigation when imposing a term under subdivision (b) of Section 1170."

As the Attorney General points out, the trial court was certainly aware of both Lunaty's service and his PTSD at the time of sentencing—both were mentioned in his probation report, and Lunaty's counsel relied on both in arguing for leniency. It also seems clear the trial court did consider the fact of Lunaty's service in deciding his sentence. In response to argument by Lunaty's counsel, the court remarked to Lunaty that "[i]t really disturbs me that you can spend so much time and energy protecting us in the military and then turn into a victimizer." The court then noted "I do give you some credit for having served, and I would be amiss if I didn't consider that." The court also stated that in imposing the midterm for Counts 5 and 6, "[it was] considering the service of Mr. Lunaty prior to the arrest."

But the court then indicated it did not believe it was *required* to take Lunaty's military service into consideration as a mitigating factor or that it was *required* to also consider the issue of PTSD as a separate mitigating factor. To the contrary, the court explained it was considering Lunaty's service even though it "is not specifically found as a circumstance in mitigation under [the] rules of court," and it made no mention at all of Lunaty's PTSD.

Given those facts, we are not persuaded by the Attorney General's assertion that the trial court actually did consider Lunaty's PTSD as a mitigating factor in sentencing. There is no evidence to support that conclusion, and we consequently conclude the court erred by failing to consider Lunaty's PTSD at the time of sentencing.

The Attorney General argues that "even where it appears a court misunderstood its discretion[,] it is unnecessary to remand to the court in order to permit it to do so where remand would be futile." The Attorney General suggests this is such a case because "the record clearly indicates that the court would not have exercised its discretion to impose low terms" even if it had been aware it must consider PTSD as a mitigating factor. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 ["resentencing was required 'unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations"].)

In arguing remand would be futile here, the Attorney General points to "the [trial] court's statements concerning the manner in which [Lunaty] carried out his offenses, its desire but inability to stack the indeterminate terms for [Lunaty's] offenses involving Jane Doe 1 . . . and the fact that the only thing that separated Jane Doe 1 from Jane Doe 2 was Jane Doe 2's quick thinking in thwarting [Lunaty] . . . ." As a result, the Attorney General argues "the court would not be willing to grant [Lunaty] any further leniency than what it has already done in selecting the midterm." But the Attorney General somewhat overstates that case. The trial court did not state any specific desire to stack Lunaty's indeterminate terms. What it said was more equivocal, i.e., that "I don't necessarily believe that this case is undeserving of stacking life counts." And the court made no comment about the fact "that the only thing that separated Jane Doe 1 from Jane Doe 2 was Jane Doe 2's quick thinking in thwarting [Lunaty]."

On this record, we cannot say it would be futile to remand the case to the trial court with directions to consider the fact Lunaty may be suffering from PTSD as a mitigating factor in sentencing. Of course, we express no opinion regarding whether the court's consideration of that factor should alter its sentencing decision.

DISPOSITION

Lunaty's convictions for assault (counts seven through ten) are reversed, and the case is remanded to the trial court with directions to resentence Lunaty on counts 5 and 6, giving consideration to the mitigating fact that he may be suffering from PTSD. The trial court is directed to issue an amended abstract of judgment and to forward it to the appropriate agency/agencies. In all other respects, the judgment is affirmed.

GOETHALS, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.